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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 373

ROY COLE and LOUIS JONES, *Petitioners*

v.

STATE OF ARKANSAS, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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Roy Cole and Louis Jones pray that a writ of certiorari issue to review a decision of the Supreme Court of Arkansas rendered June 9, 1947, petition for rehearing denied on June 30, 1947, which decision affirmed judgments of the Pulaski Circuit Court, First Division, finding petitioners guilty of violating Act 193, Arkansas Acts of 1943 (Pope's Digest Stats. Ark., 1944 Cum. Supp. p. 691).

Opinion Below

The opinion of the Supreme Court of Arkansas has not yet been officially reported. It appears in the Record at 206–209.

Summary Statement of Matter Involved

Cole and Jones, the petitioners, together with Jessie Bean, were originally indicted by an Arkansas Grand Jury for using "force and violence" to "prevent Otha Williams from engaging in work as a laborer of the Southern Cotton Oil Company" (R. 18). The indictment thus alleged a violation of Section 1 of Act 193 of the 1943 Arkansas Acts (quoted in the Appendix to this petition). The three defendants were convicted, but

on appeal the Supreme Court of Arkansas reversed and remanded for a new trial. *Cole et al. v. State*, 196 S.W. (2d) 582.

Following the reversal, the Prosecuting Attorney filed the felony information involved in this proceeding. This information charged as follows:

"On the 26th day of December, A. D. 1945, in Pulaski County, Arkansas, Walter Ted Campbell, acting in concert with other persons, assembled at the Southern Cotton Oil Company's plant in Pulaski County, Arkansas, where a labor dispute existed, and by force and violence prevented Otha Williams from engaging in a lawful vocation. The said Roy Cole, Louis Jones and Jessie Bean, in the County and State aforesaid, on the 26th day of December, 1945, did unlawfully and feloniously, acting in concert with each other, promote, encourage and aid such unlawful assemblage, against the peace and dignity of the State of Arkansas." (R. 2.)

The information thus charged Cole, Jones and Bean with violating one of the clauses of section 2 of the Act (see Appendix), that concerning aiding an unlawful assemblage. It did not repeat the charge of the indictment that they by force and violence prevented Otha Williams from working; on the contrary, this conduct was attributed to Walter Ted Campbell, not a defendant.

The Pulaski Circuit Court (First Division) then on its own motion quashed the indictment which had been the basis for the first trial (R. 8).

All three defendants were convicted on trial of the information (R. 200, 15), and they were each sentenced to serve a year in the State Penitentiary (R. 25, 26, 27).

On appeal, the Supreme Court of Arkansas, with one Justice dissenting, affirmed the convictions of Cole and Jones, the petitioners. The conviction of Bean was reversed with directions that the case be dismissed as to him (two Justices dissenting), on the ground that the evidence was not sufficient to sustain his conviction. (R. 204–209.)

In its opinion the Supreme Court of Arkansas asserted, manifestly erroneously, that the information accused the petitioners of using force and violence to prevent Otha Wil-

liams from working, in violation of section 1 of the Act (R. 208). It thus avoided the constitutional objections raised to the application of the statutory provision for violation of which the petitioners had actually been informed against (R. 208).

A petition for rehearing (R. 210, 211) was summarily denied by the Court on June 30, 1947 (R. 212).

At the trial, the following facts appeared:

The petitioners are two Negroes,[1] who were employed by the Southern Cotton Oil Company in North Little Rock, Arkansas. On December 17, 1945, about 112 of the plant's workers, including the petitioners, went out on strike for higher wages and shorter hours; five workers remained in the plant (R. 88, 90, 159, 179). On December 26, 1945, the five non-striking workers left the plant in a group at the close of work. Near the plant and across a railroad track was a group of about four of the strikers. The testimony differs as to their identity and number, but some of the State's testimony placed Cole and Jones in the group. One of the strikers, identified by the State's witnesses over his denial as Louis Jones, called to Otha Williams, one of the non-strikers, and asked him to wait. Williams refused. Walter Ted Campbell, a striker, then attacked Williams. The two men fought, and Williams used a pocket knife and killed Campbell (R. 94–97, 100, 105, 106, 112–115, 123–126, 167). The record is clear that no one other than Campbell attacked, fought or hit Williams (R. 117, 126, 140), nor does the record show any violence or physical conflict other than that between Williams and Campbell.[2]

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[1] The record designates negro witnesses by the symbol "(CM)". See R. 159 (Jones), 168 (Cole). The same symbol is used in the information (R. 2).

[2] Willie Brown, one of the five workers, testified that after Williams refused to stop, Louis Jones gave a signal and said, "Come on, boys," after which "they flew up like blackbirds and came fighting" (R. 96). However, no testimony is in the record of any blow struck other than in the Campbell-Williams fight, and Brown left the scene unmolested and on Cole's suggestion, after seeing Campbell strike Williams (R. 96, 97, 170, 171). Willie Johnson and Elvie Washington, two of the five workers, ran away (R. 108, 109, 110, 115); and the movements of the fifth worker (Lawrence Cross), who did not testify, are not in the record.

At the trial the Court instructed the jury:

"If you believe from the evidence in this case beyond a reasonable doubt that on or about the 26th day of December, 1945, Walter Campbell, acting in concert with other persons, assembled at the Southern Cotton Oil Company's plant in Pulaski County, Arkansas, where a 'labor dispute' existed and by force and violence prevented Otha Williams from engaging in a lawful vocation; and if you further believe beyond a reasonable doubt that the defendants, wilfully, unlawfully and feloniously, while acting in concert with each other, promoted, encouraged and aided such unlawful assemblage, you will convict the defendants as charged in the indictment." (R. 190, 191.)

The Court also instructed the jury that "it is perfectly lawful for laborers to peacefully picket their place of employment and to try to persuade by peaceful means other employees to join them" (R. 198, 199), and that the mere fact that defendants were present at the time of the Campbell-Williams altercation would not justify a verdict of guilty (R. 198). However, the Court did not instruct the jury that guilt could be found only if the defendants participated in or encouraged or aided any violent actions.

Statement as to Jurisdiction

This Court has jurisdiction under the provisions of Section 237(b) of the Judicial Code, as amended, 28 U.S.C. 344(b). In the proceedings below there was drawn in question the validity of Act 193, Arkansas Acts of 1943, on the ground of its being repugnant to the Constitution of the United States, and it was also claimed that the conviction thereunder infringed rights and privileges guaranteed to the petitioners under the Fourteenth Amendment.

The case was finally disposed of by the courts of Arkansas when the Supreme Court of Arkansas denied the petition for rehearing on June 30, 1947 (R. 212).

The federal questions were raised in the State courts as follows: By demurrer to the information (R. 10), the objection was made that the vagueness and uncertainty of the charges violated the United States Constitution. The demurrer

was overruled by the trial court (R. 9). The same objection was raised by the motion for a new trial (R. 20), which was overruled (R. 24). By motion to quash the information (R. 14), the objection was made that the Act violated the United States Constitution in making felonious conduct which under other circumstances was a misdemeanor. This motion was overruled by the trial court (R. 13). The same objection was raised by the motion for a new trial (R. 20), which was overruled (R. 24). On appeal to the Supreme Court of Arkansas, the appellants' briefs argued that the Act violated the Fourteenth Amendment because it infringed freedom of assembly and speech, was too vague, and constituted class legislation. The Supreme Court of Arkansas in its opinion (R. 206–209) referred, somewhat obscurely, to the Constitutional objections made, but affirmed the convictions without disposing of these issues on the palpably erroneous assumption that the defendants had also been informed against under section 1 of the statute. The petition for rehearing (R. 210, 211) pointed out this error, and also raised the objection that affirmance of the conviction under a statutory provision not included in the information itself violated the Fourteenth Amendment. The petition for rehearing was denied by the Supreme Court of Arkansas (R. 212).

Statute Involved

Act 193 of the Arkansas Acts of 1943 appears in the Appendix to this petition.

Questions Presented.

1. Were the petitioners denied freedom of speech and of assembly in violation of the Fourteenth Amendment by the clause of section 2, Act 193, Arkansas Acts of 1943, under which they were convicted, or by their convictions thereunder?

2. Were the petitioners denied due process of law in violation of the Fourteenth Amendment by conviction under a statute or on charges too vague or indefinite to inform them of the nature of the crime?

3. Were the petitioners denied due process of law or the equal protection of the laws in violation of the Fourteenth

Amendment by the circumstance that their convictions were affirmed under a criminal statute for violation of which they had not been charged?

4. Does Act 193 violate the equal protection of laws provision of the Fourteenth Amendment by making certain acts, which otherwise are misdemeanors, felonious when committed by striking workmen?

Reasons for Granting the Writ

The writ should be granted because: (1) the issues involved have not heretofore been determined by this Court; (2) they are of great public importance; (3) the decisions below contravene principles established by decisions of this Court.

1.(a) This Court has never passed on the validity, either on its face or as applied, of the statutory provision under which the petitioners were informed against and convicted at trial. This provision, as literally read and as applied at trial, makes felonious the mere acts of promoting, encouraging or aiding an assemblage at or near any place where a labor dispute exists, being qualified, if at all, only by the condition subsequent that some member of the assemblage engage in violence. The provision is not, therefore, similar to those enactments which have prohibited the use of force or violence to prevent people from working, some of which have been before this Court. *E.g., Hotel & Restaurant Employees' International Alliance v. Wisconsin Employment Relations Board*, 315 U. S. 437.

(b) Although it is elementary that due process prohibits conviction on charges not made, we are not aware of any decision of this Court which squarely considered whether this principle was infringed because the State appellate court affirmed a conviction on the basis of charges not made.

2.(a) In practical effect, the statutory provision under which petitioners were convicted and its application in this case constitute a device to evade, through obscurity of language and application, the inhibitions on State action devel-

oped in *De Jonge v. Oregon*, 299 U. S. 353; *Carlson v. California*, 310 U. S. 106; *Thornhill v. Alabama*, 310 U. S. 88; and *AFL v. Swing*, 312 U. S. 312. Any encroachment upon the principles of these cases is *per se* of great concern to organized labor and to the public generally.

This statutory provision and its application in this case have hindered efforts of the Food, Tobacco, Agricultural and Allied Workers of America (CIO), of the Congress of Industrial Organizations, and of labor generally, to organize employees in Arkansas, including low-paid employees of plants processing agricultural products. The assembling of striking workers is handicapped by their warranted fear that their mere assembling, no matter how peaceful their intentions and conduct, may subject any one of them to a felony conviction. The same situation exists in Texas, whose statute was copied by Arkansas. Act 1621b, Texas Penal Code, as amended by c. 100, Acts 1941; Vernon's Ann. Penal Code, art. 1621b. It is possible that other states will imitate these statutes in view of their effectiveness in hampering organized labor.

3.(a) Literally read, the statutory provision under which petitioners were tried makes it a felony for any person to "promote, encourage or aid" any assemblage at or near any place where a labor dispute exists. So read, it clearly violates rights of free assembly and free speech. *De Jonge v. Oregon, Carlson v. California, Thornhill v. Alabama, AFL v. Swing, supra.* If the statute is construed, as it possibly can be with a small sacrifice of literalness, as making the encouragement of such assemblage felonious only if some member of the assembly (who need not be the person tried) engages in violence or threats to prevent persons from working, it still violates these rights as established by the cited cases. In such a case, furthermore, it violates due process by departing from the principle that guilt is personal and is not to be imputed to one person for another's misconduct. *Kotteakos v. U. S.*, 328 U. S. 750, 773; *De Jonge v. Oregon, supra; Bridges v. Wixon*, 326 U. S. 135; *Schneiderman v. U. S.*, 320 U. S. 118, 136.

Nor is the statute saved by a construction of the State courts (*cf. Hotel & Restaurant Employees' International Alliance v. Wisconsin Employment Relations Board, supra*). The jury was not instructed as to any construction of the act, and it could have found guilt consistent with the instructions merely by finding that the defendants had assembled in concert with others, without participating in or encouraging violence. Indeed, it convicted Bean in the same trial, and as to him the Arkansas Supreme Court itself recognized (R. 209) that the most the evidence showed was that he had been seen near the scene of the altercation. We submit that a statute which is invalid if taken at face value cannot be saved by a construction not submitted to the jury.

(b) The statute and the information are unconstitutionally vague (*cf. Connally v. General Construction Co.*, 269 U. S. 385; *Lanzetta v. New Jersey*, 306 U. S. 451; *M. Kraus & Bros. v. U. S.*, 327 U. S. 614), particularly since freedom of expression is involved. *Cf. Herndon v. Lowry*, 301 U. S. 242.

The statute's conception of a physical "place" where a labor dispute (defined as an employer-employee controversy on representation or terms of employment) exists is a solecism whose lack of meaning alone is fatal to its validity. For some purposes, as this Court has noted, an impasse reached between workers and employers, both located in San Francisco or Seattle, may create a labor dispute which technically exists "at" canneries in Alaska. *Unemployment Compensation Commission v. Aragon*, 329 U. S. 143. In addition, the test of "nearness" without further particularization is too vague to satisfy due process under the express language of *Connally v. General Construction Co., supra*, at 294, 395.

And if construction could save the statute from unconstitutionally infringing rights of assembly and speech, the statute would then be invalid on the grounds that it could not be fairly understood "in advance of judicial utterance." *Lanzetta v. New Jersey, supra*, at 456. See also *Connally v. General Construction Co., supra*, at 394; *Pierce v. U. S.* 314 U. S. 306.

(c) "Conviction upon a charge not made would be sheer denial of due process." *De Jonge v. Oregon, supra*, at 362.

See also *Albrecht v. U. S.*, 273 U. S. 1, 8; *Snyder v. Massachusetts*, 291 U. S. 97, 105; *Powell v. Alabama*, 287 U. S. 35, 68, 69; *Twining v. New Jersey*, 211 U. S. 78, 111.

And "it is perfectly obvious that where . . . an appeal is provided for, and the prisoner has had the benefit of it, the proceedings in the appellate tribunal are to be regarded as a part of the process of law under which he is held in custody by the state, and to be considered in determining any question of alleged deprivation of his life or liberty contrary to the Fourteenth Amendment." *Frank v. Mangum*, 237 U. S. 308, 327. The Supreme Court of Arkansas construed the indictment as charging the use by the petitioners of "force and violence to prevent Williams from working" (R. 208), and this Court must therefore review the conviction as having been rendered for that crime. *De Jonge v. Oregon, supra. Cf. Herndon v. Lowry, supra.* Since it is evident that the indictment gave no fair notice that such a crime was charged, but on the contrary charged an entirely different offense, it is clear that petitioners were convicted of a charge not made, and hence were denied due process.

By misconstruing the indictment, the Arkansas Supreme Court in effect denied an appellate review of the sufficiency of the evidence to support the verdict. Since it gives such a review to others convicted under Act 193 (*e.g., Smith et al. v. State*, 207 Ark. 104, 179 S.W. (2d) 195), it denied the petitioners the equal protection of the laws. *Cf. Cochran v. Kansas*, 316 U. S. 255; *Hysler v. Florida*, 215 U. S. 420, 422, 423.

(d) Taking the Arkansas court's construction of the indictment as alleging a violation of section 1 of the Act, it will be observed that if a striking worker assaults a non-striker, he is guilty of a felony. If simultaneously, within a foot of this assault, a non-striker assaults a striker, he is guilty of a misdemeanor. We submit that this is discriminatory class legislation, and that the statute therefore violates the Fourteenth Amendment.

Conclusion

The writ of certiorari should be granted and the decision of the lower court should be reversed.

Respectfully submitted,

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APPENDIX

Act 193, Acts of Arkansas 1943

Section 1. It shall be unlawful for any person by the use of force or violence, or threat of the use of force or violence, to prevent or attempt to prevent any person from engaging in any lawful vocation within this State. Any person guilty of violating this section shall be deemed guilty of a felony, and upon conviction thereof shall be punished by confinement in the State Penitentiary for not less than one (1) year, nor more than two (2) years.

Section 2. It shall be unlawful for any person acting in concert with one or more other persons, to assemble at or near any place where a "labor dispute" exists and by force or violence prevent or attempt to prevent any person from engaging in any lawful vocation, or for any person acting either by himself, or as a member of any group or organization or acting in concert with one or more other persons, to promote, encourage or aid any such unlawful assemblage. Any person guilty of violating this section shall be deemed guilty of a felony, and upon conviction thereof shall be punished by confinement in the State Penitentiary for not less than one (1) year, nor more than two (2) years.

Section 3. The term "labor dispute" as used in this Act shall include any controversy between an employer and two (2) or more of his employees concerning the terms or conditions of employment or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment.

Section 4. The provisions of this Act shall be cumulative of all other existing articles of the Penal Code upon the same subject, and in the event of a conflict between existing articles and the provisions of this Act, then and in that event the provisions, offenses and punishments set forth herein shall prevail over such existing articles.

Section 5. If any section, paragraph, clause, or provision of this Act is declared unconstitutional, inoperative or invalid by any court of competent jurisdiction, the same shall not affect or invalidate the remainder of this Act.